Supreme Court, U.S.
FILED

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No. 06 ____

IN THE

SUPREME COURT OF THE UNITED STATES

James J. Hayes

Petitioner,

vs.

GENESIS HEALTH VENTURES, INC., ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James J. Hayes
Petitioner
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QUESTONS PRESENTED

1. Does the Due Process Clause of the Fifth Amendment require the appointment of a post-confirmation "equity committee" when former debenture holders allege a conspiracy among the "debtor" and certain "senior lenders" to undervalue the debtors' estates in securing the confirmation of a "reorganization plan" that deprives equity holders of their ownership without compensation when the undervaluation causes over compensation of the senior lender claims sufficient to satisfy the claims of all other creditors leaving substantial value for the equity holders?

2. Does Section 1102(a)(2) of the Bankruptcy Code require the appointment of a post-confirmation equity committee when former debenture holders allege a conspiracy among the debtor and certain senior lenders to undervalue the debtors' estates in securing the confirmation of a reorganization plan that deprives equity holders of their ownership without compensation when the undervaluation causes over compensation of the senior lender claims sufficient to satisfy the claims of all other creditors leaving substantial value for the equity holders?

3. Can federal appellate courts dismiss bankruptcy appeals on the basis of the judicial doctrine of Equitable Mootness or does Article III require that bankruptcy appeals be decided on the merits unless the appeal is actually moot?

4. Can federal appellate courts dismiss bankruptcy appeals on the basis of the judicial doctrine of Equitable Mootness when the courts have not made findings that the relief requested would affect: 1) the rights of parties not before the court, or 2) the success of the plan?

PARTIES TO THE PROCEEDINGS

Petitioner James J. Hayes is an equity holder of the debtor, Genesis Health Ventures, Inc. during its bankruptcy

Respondent Genesis Health Ventures, Inc. is the debtor in the bankruptcy proceedings.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2006

James J. Hayes,

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR WRIT OF CERTIORARI

James J. Hayes, a member of the equity class in the bankruptcy of Genesis Health Ventures, whose equity was extinguished by the reorganization plan without compensation, respectfully requests this Court grant this petition for a writ of certiorari to review the dismissal of an appeal from the Bankruptcy Court's denial of a motion requesting the appointment of a post-confirmation equity committee by the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The Third Circuit Opinion granting the Appellee's cross motion to dismiss the appeal appears in the Appendix at A1. (App. A1) The District Court Memorandum Opinion

dismissing the appeal and in the alternative, affirming the May 13, 2004 Order of the Bankruptcy Court appears in the Appendix at A5. The transcript ruling of the Bankruptcy Court bench decision denying the motion to appoint a post confirmation equity committee is provided in the Appendix at A11.

The Bankruptcy Court Opinion on Confirmation is reported as: *In Re Genesis Health Ventures, Inc.* 266 B.R. 591 (Bkrtcy. D. Del. 2001).

JURISDICTION

The Third Circuit Judgment was entered on October 4, 2006. A timely Petition For Rehearing was denied on November 29, 2006, and a copy of the order denying rehearing appears in the Appendix at A16.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

In this case, jurisdiction of this Court is required by *Marbury v. Madison,* 5 U.S. (1Cr.) 137 (1803) which requires federal courts to decide constitutional issues that were raised but undecided by the courts below.

> The judicial power of the United States is extended to all courts arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained.

> In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or do they obey?
>
> *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177-78 (1803)

In this case, the Petitioner argued to the Bankruptcy Court, the District Court, and the Third Circuit that equity holders' Fifth Amendment Due Process rights were violated by the denial of an equity committee; as equity holders had not been adequately represented in the bankruptcy proceedings. The courts below apparently believe they lack jurisdiction to decide the constitutional issues because the underlying cause was determined to be equitably moot.

Equitable Mootness cannot absolve the jurisdictional question, because in this case *Marbury* requires the courts below to decide the constitution issues. Under these circumstances, this Court must take jurisdiction, if only to remand this case to the courts below to decide the constitutional issues.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fifth Amendment provides that: "[n]o person shall… be deprived of life, liberty, or property, without due process of law...."

Section 1102(a) (2) of the Bankruptcy Code provides that: "[o]n request of a party in interest, the court may order the appointment of additional committees of creditors or of equity security holders if necessary to assure adequate representation of creditors or of equity security holders."

STATEMENT OF THE CASE

This case is an appeal of the Bankruptcy Court's May 13, 2004 bench decision denying the appointment of a post-confirmation equity committee. The motion for the equity committee contemplated that the committee would argue an appeal of the Bankruptcy Court's September 2001 order confirming the reorganization plan of Genesis Health Ventures and its majority owned subsidiary MultiCare.[1] The motion remained undecided until after the appeal of the confirmation order was dismissed for Equitable Mootness.

On January 27, 2004, however, 275 former debenture holders of Genesis led by Richard Haskell filed a complaint that alleged that Genesis and certain senior lenders conspired to undervalue Genesis in the bankruptcy proceedings. The alleged undervaluation caused the Bankruptcy Court to confirm a plan that awarded the senior lenders almost all of the equity in the reorganized company.[2]

Based on the valuation information in the Haskell complaint, the petitioner renewed his request for the appointment of a post-confirmation equity committee. On May 13, 2004, the Bankruptcy Court conducted a hearing on the earlier motion for the appointment of a post-confirmation equity committee.

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[1] Genesis is the country's third largest operator of nursing homes and the second largest institutional pharmacy.

[2] Interlocutory opinions in this ongoing case, captioned *Haskell v. Goldman, Sachs & Co., et al.*, include: D. Del. on Feb. 15, 2007 at WL 495158; D. Del. on Jan. 26, 2007 at WL 211209; Bankr. D. Del. on Dec. 13, 2006 at 355 B.R. 438; D. Del. on Mar. 29, 2006 at 340 B.R. 729; and Bankr. D. Del., 2005 at 324 B.R. 510.

At the hearing, the petitioner showed the Bankruptcy Court that the Haskell complaint identified ten instances where Genesis had understated EBITDA,[3] which led to undervaluing the Genesis estate by more than a billion dollars. The petitioner argued that the undervaluation resulted in the senior lenders receiving distributions, principally common stock in the reorganized firm, with a value far in excess of their claims. The excess value provided to the senior lenders is sufficient to pay the $730 million in unsatisfied claims, and leave a substantial recovery for the equity class. (Because the Bankruptcy Code does not allow reorganization plans that provide creditors value that exceeds their claims; the Bankruptcy Court could order the senior lenders to pay the excess value to the debtors' estate.)

In a bench decision, the Bankruptcy Court denied the motion and the District Court and Third Circuit subsequently dismissed the appeal on the basis of Equitable Mootness. (App. A11, A5, and A1 respectively.)

REASONS FOR GRANTING THE PETITION

This is a simple case about the appointment of a post-confirmation equity committee following allegations of fraud in the confirmation of a reorganization plan that cancelled equity holders stock in a major health care company without providing equity holders any compensation. The reasons for granting this petition are particularly compelling as this case raises Fifth Amendment issues that could favorably effect bankruptcy jurisprudence and increase national wealth.

The courts below have gone to extremes – by ignoring

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[3] EBITDA is an acronym for "earnings before interest, taxes, depreciation, and amortization," and is used as a measure of financial performance. (Quoting, *In re Genesis*, 324 B.R. at 513.)

constitutional issues and failing to apply the factors the Third Circuit requires for application of Equitable Mootness – to avoid considering the merits of the appeal. Even when properly applied, Equitable Mootness is a fundamentally flawed concept that has been emphatically rejected by the Seventh Circuit. These reasons for granting this petition are discussed in sections B, C, and D below.

Section A argues that granting the petition is required when courts of appeal don't decide the constitutional issues raised in the appeal.

A. This Court in *Marbury v. Madison* Requires Granting Petitions to Decide Constitutional Issues That Were Raised but Not Decided By the Lower Federal Courts

The appeal of the Bankruptcy Court's denial of a post-confirmation equity committee raised Fifth Amendment Due Process issues in the District Court and the Third Circuit. Both courts ignored the constitutional issues in dismissing the appeals on the basis of the judicial doctrine of Equitable Mootness. Since deciding *Marbury v. Madison* 1803, this Court has required federal courts to decide constitutional issues that are raised in appeals under their jurisdiction.

The failure of the courts below to decide the constitutional issues leaves the obligation to decide the constitutional issues to this Court.

Article III, Section 2, Clause 1 of the Constitution states that: "[t]he judicial Power shall extend to all Cases in Law and Equity, arising under this Constitution...."

Chief Justice John Marshall established the obligation of judicial review with these words:

> It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other the courts must decide on the operation of each. So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.
>
> *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177-78 (1803)

In this case, the District Court acknowledged that the appeal contended that the denial of a post-confirmation equity committee deprives equity holders the "adequate representation" provided by Section 1102(a) of the Bankruptcy Code, and "violates shareholders' due process rights under the Fifth Amendment." The court nevertheless dismissed the appeal as "equitably moot," without deciding the representational and constitutional issues. (App. 1)

In this case, *Marbury* requires the courts to decide on the operation of Equitable Mootness and Section 1102(a), for example: "If two laws conflict with each other the courts must decide on the operation of each." Id. First, *Marbury* requires the courts below to decide whether there is a conflict between appointing a post-confirmation equity committee that could represent equity holders in post- confirmation actions and the doctrine of Equitable Mootness that could

preclude actions that would require the unscrambling "complex bankruptcy reorganizations." *Nordhoff Investments, Inc. v. Zenith Elecs. Corp.*, 258 F. 3d 180, 185 (3d Cir. 2001)

The courts below assume without saying that a post-confirmation equity committee could not obtain relief for equity holders that would not require unscrambling of the reorganization. In not making this decision, however, the courts deny equity holders an appeal based on the value allegations derived from the *Haskell* complaint that the senior lenders were awarded value in excess of their claims that could be recovered by a post-confirmation equity committee for the benefit of the debtor's estate. Under *Marbury*, it falls to this Court to require the courts below to decide whether, under the circumstances, the doctrine of Equitable Mootness conflicts with the appointment of an equity committee under Section 1102(a).

Second, *Marbury* requires the courts to consider the Fifth Amendment Due Process rights of equity holders before dismissing the appeal as being equitably moot under the Equitable Mootness doctrine.

> So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case.
>
> *Marbury v. Madison*, 5 U.S. (1Cr.) 137, 177-78 (1803)

Third, *Marbury* requires the courts to decide whether the Fifth Amendment requires that equity holders be adequately represented in bankruptcy proceedings that produce a

reorganization plan that cancels equity holders' stock without providing any compensation. If the constitution requires adequate representation, and if equity holders were not adequately represented; then *Marbury* requires the courts to decide whether a plan confirmed in violation of the constitution is nevertheless protected from attack by the judicial doctrine of Equitable Mootness. *Marbury* answers this question as follows:

> If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which both apply.
>
> Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.
>
> The judicial power of the United States is extended to all courts arising under the constitution.
>
> Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?
>
> This is too extravagant to be maintained.
>
> In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or do they obey?

Marbury v. Madison, 5 U.S. (1Cr.) 137, 177 (1803)

In dismissing the appeal of the Bankruptcy Court's denial of a post-confirmation equity committee for Equitable Mootness, the District Court and the Third Circuit close their eyes on the constitution, and see only the law. It falls to this Court to require the courts below to decide the Fifth Amendment issues.

The duty of Article III courts to consider the constitution paramount to ordinary law has not changed in the 200 years following *Marbury*. In 1957, for example, this Court examined the denial of passports to certain groups on the question whether this denial violated the Fifth Amendment rights of liberty to these citizens.

> We deal here with a constitutional right of the citizen, a right which we must assume Congress will be faithful to respect. We would be faced with important constitutional questions were we to hold that Congress...had given the Secretary authority to withhold passports to citizens because of their beliefs or associations.
>
> *Kent v. Dulles*, 357 U.S. 116, 130 (1957)

Kent shows that federal courts must consider the constitution and consider it paramount even in deciding apparently simple administrative cases like granting pass ports. In this case, when the apparently simple administrative decision of appointing an equity committee impinges on property rights; the courts must decide the constitutional issues as well.

In this case, the courts below have not decided the constitutional issues raised in the appeal. The failure denies equity holders their Fifth Amendment Due Process rights that can now only be remedied by granting this petition.

B. Granting This Petition Provides This Court the Opportunity to Resolve A Conflict between the Third and Seventh Circuits on the Application of the Judicial Doctrine of Equitable Mootness

In 1996, the Third Circuit developed the judicial doctrine of Equitable Mootness to dismiss viable bankruptcy appeals as moot even though effective relief could be fashioned, but "where implementation of that relief would be inequitable." *In re Continental Airlines*, 91 F. 3d 553, 559 (3d Cir. 1996) (en banc. 7-6).

Equitable Mootness seems premised on the belief that when a reorganization is substantially completed before an appeal; that appellate courts can't tailor relief that would not require unscrambling of the reorganization, which would affect the rights of parties not before the court and potentially the success of the reorganization. The Third Circuit remedy to this dilemma is to dismiss the appeal as moot without considering the merits of the appeal. This constitutionally suspect approach was decided by a single vote in an en banc appeal.

Part of the controversy questions the premise that relief in meritorious bankruptcy appeals requires undoing the reorganization. The merits of many bankruptcy appeals boils down to whether the debtor's estate was undervalued in the bankruptcy, and/or whether the plan distributions over compensated some creditors, to the detriment of the appealing party. In both situations, courts could order monetary relief (or return of the equivalent securities distributions) from the over compensated class to the appealing party without unscrambling the reorganization or affecting the rights of parties not before the court. Thus, there is no justification for federal appellate courts to refuse their constitutional duty to decide controversies under their jurisdiction.

The Seventh Circuit believes dismissing appeals without considering the merits of the appeal based on Equitable Mootness is a bogus concept; even banishing the term "'equitable mootness' from the (local) lexicon." *In re UNR Industries, Inc.*, 20 F. 3d 766, 769 (7th Cir. 1994).

The Seventh Circuit first decides the merits of its bankruptcy appeals and then determines whether relief is possible with a modification of the plan before considering an equitable dismissal. The Seventh Circuit is clear that an equitable dismissal has nothing to do with mootness.

> We ask not whether this case is moot, "equitably" or otherwise, but whether it is prudent to upset the plan of reorganization....
>
> *In re UNR Industries, Inc.*, 20 F. 3d 766, 769 (7th Cir. 1994)

Judge Posner further explained the differences with the doctrine of Equitable Mootness as adopted by the Third Circuit.

> This principle went by the misleading name of "equitable mootness," until the name was anathematized by Judge Easterbrook in the UNR case. (Id. 769) The now nameless doctrine is perhaps best described as merely an application of the age-old principle that in formulating equitable relief a court must consider the effects of the relief on innocent third parties. *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 375 (1977); *Okaw Drainage District v. National Distillers & Chemical Corp.*, 882 F. 2d 1241, 1248 (7th Cir. 1989)
>
> *In the Matter of: Envirodyne Industries, Inc.*, 29 F. 3d 301, 304 (7th Cir. 1994)

The Seventh Circuit determined "at least partial relief is possible, and that is enough to satisfy the requirements of Article III." *Envirodyne* at 304; citing *In re UNR Industries, Inc.*, 20 F.3d 766, 768 (7th Cir. 1994). The conclusion on partial relief is based on the court's analyses that it:

> could order the bankruptcy judge to modify the plan of reorganization to reallocate $20 million worth of the stock that the 14 per cent noteholders received to the appellants, the 13.5 per cent noteholders. Some of the 14 per cent noteholders, it is true, have already sold their stock, but they could be ordered to surrender some or all of the proceeds to the appellants.
>
> *In the Matter of: Envirodyne Industries, Inc.*, 29 F. 3d 301, 304 (7th Cir. 1994)

Even though the reorganization was complete; the Seventh Circuit found that the appeal was not moot as the court could provide some relief:

> since, despite its former name, "equitable mootness" is not a jurisdictional doctrine (which is one reason the name has been discarded), we can with propriety elide the question of its applicability and come directly to the question of the indenture's meaning.
>
> *Envirodyne* at 304.

After concluding that relief is possible, it is the court's duty to decide the appeal on its merits.

In the Third Circuit, however, substantial implementation of the reorganization plan is pretty much the end of its Equitable Mootness analysis -- "'the foremost consideration

is whether the reorganization plan has been consummated,'" (App. A3) (Citing: *In re PWS Holding Corp.*, 228 F. 3d 224, 236) This conclusion, however, is based on the false premise that the only possible relief the court could provide would require unscrambling the reorganization and that would adversely effect the rights of persons not before the court and possibly the success of the reorganization.

The problem with both the doctrine as articulated in *Continental*, and the Third Circuit's application here is that an appeal is not moot if courts can provide even some relief, even if that relief is inequitable. This fact compels the courts to decide the appeal on the merits; and then, if the court finds the appeal meritorious, to formulate relief that is equitable. Only if equitable relief is not possible can a court dismiss the appeal. To do otherwise and the court violates its Article III duty to exercise its "judicial Power" to decide controversies under its jurisdiction.

In 2005, the Second Circuit reviewed the arguments regarding the application of Equitable Mootess and agreed with the Seventh Circuit analysis in *Envirodyne*. As explained by the Second Circuit:

> [b]ecause equitable mootness bears only upon the proper remedy, and does not raise a threshold question of our power to rule, a court is not inhibited from considering the merits before considering equitable mootness. (Referencing, *In re Envirodyne Indus. Inc.*, 29 F. 3d at 303-04.) Often an appraisal of the merits is essential to framing of an equitable remedy.
>
> *In Re Metromedia Fiber Network, Inc.*, 416 F. 3d 136, 144 (2nd Cir. 2005)

In addition to the Seventh Circuit, six judges in the *Continental* minority saw the majority opinion as creating a bad precedent. Writing for the dissent, Judge Samuel Alito explained:

> The majority's decision in this case creates a bad precedent for our circuit. The majority adopts the curious doctrine of "equitable mootness," which it interprets as permitting federal district courts and courts of appeals to refuse to entertain the merits of live bankruptcy appeals over which they indisputably possess statutory jurisdiction and in which they can plainly provide relief. According to the majority, there is no clear rule for determining when a bankruptcy appeal is equitably moot." Instead, this is said to be a discretionary determination to be made in the first instance by the district court based on a weighing of five factors that the majority has culled from the opinions of our "sister circuits." In my view, **if the doctrine has any validity, it is more limited than the majority holds. (Emphasis added)**
>
> *In re Continental Airlines*, 91 F. 3d 553, 567 (3rd Cir. 1996) (en banc 7-6)

Granting this petition provides this Court the opportunity to resolve the conflict between the Third and Seventh circuits on the application of Equitable Mootness in bankruptcy appeals.

C. Granting This Petition Provides An Opportunity For This Court To Exercise Its Supervisory Power In A Precedent Setting Case; As the Bankruptcy Court, the District Court, and the Third Circuit Failed To Consider the Application of the Fifth Amendment, And the Five *Continental* Factors In Dismissing This Appeal For Equitable Mootness

The District Court concluded that its previous Equitable Mootness dismissals of the appeals of the Bankruptcy Court's order confirming reorganization plan placed the confirmation order beyond challenge making the request for a post-confirmation equity committee "equitably moot."

> In *Grimes*[4] *v. Genesis Health Ventures, Inc.*, 280 B.R. 339, the Court concluded that an appeal of the confirmation order in the Genesis bankruptcy cases were equitably moot based on the *Continental* factors. The Court's conclusions in *Grimes* regarding the application of the *Continental* factors applies with equal force to this case. The Plan has been substantially consummated. And the Appellant neither sought nor obtained a stay of the conformation order. Because the confirmation order cannot be challenged, Appellant's request for the appointment of a post-confirmation equity committee to support the appeal of the Bankruptcy Court's September 20, 2001 confirmation order[5] is equitably moot.
>
> *District Court Opinion* (App. A8)

In reaching the above conclusions, the District Court did not consider that the arguments for a post-confirmation equity committee focused on allegations in the *Haskell* complaint– that the undervaluation of the debtor created a windfall for

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[4] Grimes is a holder of Genesis debentures and one of the plaintiffs in Haskell v. Goldman Sachs.

[5] The post-confirmation equity committee was initially sought to support the appeal of the confirmation order, however, since that appeal had been dismissed prior to the Bankruptcy Court's hearing for the appointment of a post-confirmation committee, the justification for a committee at the hearing focused on the fraud allegations in the recently filed Haskell complaint.

the senior lenders– rather than to support an appeal of the confirmation order that had previously been dismissed. This oversight foreshadows the constitutionally significant District Court failure to decide the Fifth Amendment issues and to consider the last three *Continental* factors as described below.

1. The Courts Below Failed To Decide The Fifth Amendment Due Process Issues As Required By This Court

In dismissing the appeal as equitably moot, the District Court did not decide whether inadequate representation of the equity holders during bankruptcy proceedings, which produced the plan that cancelled the equity holders stock, violated equity holders' Fifth Amendment Due Process rights. Such a violation would raise questions on whether the confirmation order could be challenged by a post-confirmation equity committee.

The situation is analogous to the Fifth Circuit's application of Fifth Amendment Due Process in the *Kendavis* bankruptcy. In that case, the court reviewed and upheld the application of Fifth Amendment Due Process in bankruptcy proceedings fifteen years after the confirmation of the reorganization plan.[6] After concluding that "[u]nder the Supreme Court's standard, we must analyze the particular facts of each case,"[7] the Fifth Circuit found that the employee was not provided his Fifth Amendment Due Process rights. *In*

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[6] In Kendavis, a retired employee discovered that deficiencies in his retirement compensation resulted from a transfer of $20 million from the company's retirement plan to creditors in the bankruptcy reorganization. The employee's suit precipitated reopening the bankruptcy.

[7] The Fifth Circuit's conclusion is more applicable to this case. First in Kendavis, the plaintiff was an employee, with more tenuous ties to the Fifth Amendment than the equity holders who are the Cont.

Re Kendavis Holdings Co. 249 F. 3d 383, 386 (5th Cir. 2001). In this case, however, the District Court simply ignores this Court's standards and fails to decide the Fifth Amendment Due Process issues based on the particular facts of the case.

In this case, the equity holders were the collective owners of the debtor, and were denied representation by an equity committee in both the pre-confirmation and post-confirmation proceedings. These particular facts plus the fact that Section 1102(a)(2) provides for the appointment of an equity committee to "assure adequate representation... of equity security holders;" invokes application of the Fifth Amendment Due Process.

By granting this petition, this Court has an important opportunity to exercise its supervisory power to ensure that bankruptcy courts recognize the Fifth Amendment Due Process rights of equity classes in confirming bankruptcy reorganization plans.

2. The District Court and the Third Circuit Failed To Balance The Five *Continental* Factors

According to the District Court:
[a]s adopted by the Third Circuit in *Continental*, the doctrine of equitable mootness requires the court to balance five factors which are unique to bankruptcy proceedings:

1) whether the reorganization plan has been

owners of the debtor in this case. Second, the plaintiff was represented in the bankruptcy proceedings by the creditors committee who fully participated in the negotiation of the plan whereas the equity holders were not adequately represented. Third, Fifth Amendment Due Process protection was based on a slender claim of inadequate notification of the bankruptcy proceedings; depriving the employee his right to object to the reorganization plan. In this case, Fifth Amendment protection is based on a taking of property without compensation.

substantially consummated;
2) whether a stay has been obtained;
3) whether the relief requested would effect the rights of parties not before the court;
4) whether the relief requested would affect the success of the plan;
5) the public policy of affording finality to bankruptcy judgments.

The manner in which these factors are weighed depends on the facts and circumstances of each case.

District Court Opinion, App. A8.

In applying *Continental*, the District Court noted that: "[t]he Plan has been substantially consummated and Appellant neither sought nor obtained a stay of the confirmation order." Id. A8-9. The District Court's evaluation of the three remaining *Continental* factors, however, relied on its earlier findings in the *Grimes* appeal of the confirmation order: "[t]he Court's conclusions in *Grimes* applies with equal force to this case." Id. A8.

The petitioner respectfully disagrees that the District Court's conclusions with respect to the last three *Continental* factors in *Grimes* can be applied to dismiss this appeal, particularly since Grimes as a member of the Haskell group filed a fraud on the bankruptcy court suit subsequent to the Court's dismissal his appeal for equitable mootness.

The petitioner has argued at every opportunity, before the Bankruptcy Court, the District Court and the Third Circuit that specific allegations of fraud in the *Haskell* complaint show that the Genesis estate was undervalued by hundreds of millions of dollars as detailed in the chart below.

Summary of Fraud Allegations in *Haskell* Complaint and Associated EBITDA* Reductions

Bondholder Allegation	EBITDA* Reductions ($ millions)	Long Term Care	Pharmacy
a) Excessive Insurance Reserves	13.0	5.8	7.2
b) Multi Care Management Fees	11.6	11.6	0.0
c) Manor Care Pharmacy Sales	11.0	0.0	11.0
d) Mariner Contract	13.4	0.0	13.4
e) AGE Loss	3.0	1.3	1.7
f) Management Retention Bonus	6.0	2.7	3.3
g) Health Plan Savings	13.0	5.8	7.2
h) Pharmacy Costs	26.0	0.0	26.0
i) Increased Medicare Mix	4.0	4.0	0.0
j) Additional Personnel Costs	35.0	15.7	19.3
Total Adjustments	136.0	46.9	89.1
Valuation Increase (Chilmark EBITDA Multiples)	$ 1,152.4	328.5	824.0

*EBITDA is equal to earnings before interest, taxes, depreciation and amortization

Complaint, Richard *Haskell, et al., v. Goldman, Sachs & Co., et al.*, Bankr. Case No. 002692.

The table shows that the Genesis debtors' estate was under valued by $1.15 billion. This under valuation value would be incorporated in the new Genesis stock, ninety four per cent of which was awarded to the senior lenders. The undervaluation provided the senior lenders as much as a billion dollars in excess of their claims. The wind fall is sufficient to pay the $730 million in unsatisfied claims, based on the plan confirmed by the Bankruptcy Court, and leave substantial relief for the equity holders.[8] (See *In Re Genesis Health Ventures, Inc.*, 266 B.R 591, 597-98 & 616, (Bankr.

[8] The Bankruptcy Code, 11 U.S.C 1129(b) (2), prohibits plans that provide creditors value more than their claims. (See In re MCorp. Financial Inc., 137 B.R. 219, 225 (Bankr. S. D. Tex. 1992)

D. Del. 2001)

The reorganized debtors' value in excess of the bankruptcy claims is the source of the relief that a post-confirmation equity committee could recover for the Genesis estate. Recovery of excess value would not require the renegotiation of a new plan or affect the rights of parties not before the court. It would simply require an equity committee with the authority to seek the repayment of the value in excess of claims received by the senior lenders.

The District Court did not see the relevance of the *Haskell* allegations. (App. A9, n.1) However, as the table shows, the fraud allegations of under estimated enterprise value are critical to showing that the last three *Continental* factors do not favor dismissal of the appeal. If, for example, the undervaluation provided the senior lenders value in excess of their claims; the relief requested in the appeal would come from the senior lenders paying back the value they received in excess of their claims. There would be no effect on parties not before the court, or the success of the plan. *Continental* factors four and five would not favor dismissing the appeal.

The Third Circuit should have required the District Court to analyze the last three *Continental* factors in light of the facts in this case, including facts contained in the *Haskell* complaint that was filed many months after the Court had dismissed the Grimes appeal. However, rather than remand the case to the District Court; the Third Circuit covered-up the District Court's incomplete *Continental* analysis by determining for itself the *Continental* factors overlooked by the District Court.

The Third Circuit's evaluation of the final three *Continental* factors follows below:

> [t]he rights of third parties who have long relied on the consummated plan would be negatively affected, and the relief that Hayes seeks would likely cause the reversal or unraveling of the Plan. If, as Hayes asserts, the plan is unfair and inequitable, it would be so for all Debtors' unsecured creditors and would require a newly negotiated plan. Finally, the consummation of the plan in 2001, the reliance upon it by third parties for all these years, and the negative impact of Hayes's request for relief on the success of the plan all operate to the detriment of the long recognized public policy supporting the finality of bankruptcy judgments.
>
> *Third Circuit Opinion*, App. A4.

The Third Circuit created these false *Continental* findings that it attributed to the District Court. The statement that appointment of a post-confirmation equity committee would "negatively affect" the rights of third parties, and would cause "reversal or unraveling of the plan," is false considering the *Haskell* undervaluation allegations that caused the senior lenders to receive value in excess of their claim. Ordering this windfall be returned to the debtors' estate would not affect the rights of third parties or cause unraveling of the plan.[9] The public policy of supporting finality of bankruptcy judgments is not intended to cover-up a major fraud.

The failure of the Bankruptcy Court, the District Court and the Third Circuit to consider whether the equity class was adequately represented and whether the lack of representation

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[9] The situation is analogous to the overpayment of legal fees in Zenith where Judge Becker concluded that: "[f]ar from causing the reorganization plan to unravel, the Trustee's appeal, if successful, would return money to the estate." In Re: Zenith Electronics Corp., 329 F. 3d 338, 347 (3rd Cir. 2003)

violated both the Bankruptcy Code and Fifth Amendment Due Process merits granting the petition to examine whether the use of this Court's supervisory power is warranted. Similarly, the Third Circuit's overlooking the fact that the District Court had not considered the final three *Continental* factors before dismissing the appeal, and then added findings justifying equitable mootness are more compelling reasons to grant the petition.

D. Granting This Petition Provides This Court An Opportunity To Renew The Application of The Fifth Amendment To Bankruptcy Proceedings To Protect Equity Holders From Vulture Investors Who Exploit Bankruptcy Rules To Gain Enormous Profits At The Expense Of Low Priority Creditors And Equity Holders

Questions on the applicability of the Fifth Amendment to bankruptcy reorganizations are more than esoteric legal arguments. Sophisticated investors are using the absence of Fifth Amendment protection in modern times to abuse the bankruptcy process to effect huge windfall profits for themselves to the detriment of other creditors, equity holders and the efficiency of the public markets. Gaming the bankruptcy process reduces the efficiency of the market in valuing companies with lower quality balance sheets and/or large amounts of distressed debt. The reduced market value of these companies – on investor expectations that their investment may be taken in a bankruptcy reorganization – reduces national wealth.

In the Genesis bankruptcy, the Haskell alleged an Enronesque accounting fraud on the bankruptcy court that under valued the Genesis estate by more than a billion dollars. Application of the Due Process Clause to bankruptcy reorganizations to require adequate representation of the

equity class in bankruptcy proceedings would protect equity investors in solvent companies, like Genesis, pushed into bankruptcy by sophisticated outside investors, often private capital, looking to enhance their profits by abusing the bankruptcy rules to achieve a bankruptcy court sanctioned taking of equity.

1. The Seitel Bankruptcy Shows That Providing Due Process To Equity Holders Benefits The Bankruptcy Process

The 2003 bankruptcy of Seitel,[10] which coincidently was in the same Delaware bankruptcy court as Genesis, illustrates that providing equity holders' representation by an equity committee can improve the bankruptcy process to benefit both creditors and equity holders.

Seitel was forced into bankruptcy by its senior bond holders concerned that mismanagement and self dealing by the CEO threatened their investment. Thus began maneuvering by vulture investors to gain control of Seitel at a bargain price. Berkshire Hathaway and Ranch Capital bought $255 million of Seitel's senior debt for about 66 cents on the dollar and later joined with the debtor in proposing a reorganization that would provide the debt holders about 71 per cent of their claims, and equity holders $0.40 per share for the common stock.

Following the announcement of the bankruptcy filing, however, a hedge fund, acquired about 10 per cent of the common stock and then requested the U. S. Trustee appoint an equity committee, which was granted.

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[10] Seitel is an oil and gas exploration service company that leases seismic data from one of the largest seismic data libraries in North America

In the meantime, the debtor proposed a reorganization plan based on $280 million purchase of Seitel by Berkshire. The equity committee, with the assistance of its legal and financial advisors, succeeded in convincing equity holders to vote down the plan. The equity committee then proposed an alternative reorganization plan, which was financed by the new debt, and by equity holders through an issue of common stock warrants. The equity holders' plan, which was approved by the bankruptcy court, cashed out the senior note holders for 100 cents on the dollar, and allowed equity holders to retain 100 per cent of Seitel's equity.[11]

The new stock, which cost equity holders about $.60 per share, traded between $.69 and $1.58 in 2004 and was recently acquired in 2007 for $3.70 per share in a going private transaction.

The Seitel bankruptcy shows that the appointment of an equity committee and participation of equity in the bankruptcy proceedings is essential to maximizing the value of the debtor and insuring the highest distributions to all parties. It also shows the importance of granting this petition as Genesis is as much of an undervalued debtor as Seitel and good bankruptcy outcomes are all too rare in modern bankruptcies dominated by vulture investors.

2. Application of The Takings Clause To Bankruptcy Reorganizations Is The Needed Companion Of Due Process In Protecting Equity Holders And Promoting More Efficient Markets

The Takings Clause of the Fifth Amendment provides that

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[11] Hedge Fund's Gamble Manages to Beat Buffett Manager's Complex Plan, Wall St. Journal, March 29, 2006: C3 (See Appedix A18.)

private property shall not be taken for public use, without just compensation. This Court has held that the Takings Clause applies to the Bankruptcy Code, but has not examined whether reorganization plans that cancel equity holders stock and then reissue stock to creditors without compensating equity holders violates the Takings Clause. In an opinion by Justice Brandeis, this Court held as follows:

> [t]he bankruptcy power is subject to the Fifth Amendment's prohibition against taking private property without compensation;
>
> . . .
>
> [t]he province of the Court is limited to deciding whether the Frazier-Lemke Act as applied has taken from the Bank without compensation, and given to Radford, rights in specific property which are of substantial value;
>
> . . .
>
> the Fifth Amendment commands that, however great the Nation's need, private property shall not be thus taken even for a wholly public use without just compensation. If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain;
>
> *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555, 602 (1935)

Forty five years later, this Court affirmed the application of the Takings Clause to the Bankruptcy Code.

> The foregoing discussion satisfies us that there is substantial doubt whether the retroactive destruction [by the retroactive application of a Bankruptcy

Reform Act property exemption] of appellees' liens in this case comports with the Fifth Amendment.

United States v. Security Industrial Bank, 459 U.S. 70, 78 (1982)

There should be no difference, however, between protecting banks from bankruptcy legislation, the Frazier-Lemke Act, that, for example, takes the property of individual mortgagees in order to relieve the necessities of individual mortgagors, and reorganization plans that take the property of equity holders for the benefit of creditors without providing compensation. In today's dynamic markets, this oversight in applying the Takings Clause is all that vulture investors need to achieve enormous windfall profits by developing reorganization plans that take the existing equity without providing equity holders compensation.

For companies less solvent than Seitel or Genesis, the Takings Clause is a needed adjunct to Due Process to protect equity holders, and low priority creditors. In the recent Loral[12] bankruptcy, for example, the Chief Executive Officer adequately represented equity holders in arguing that the debtors' financial experts had significantly undervalued his company. The bankruptcy court nevertheless accepted a the debtor's valuation and consequently approved a plan that provided the equity in the reorganized company to the bondholders without compensating equity holders. CEO Schwartz characterized the inequity of the bankruptcy process: "[t]here's something wrong with a system where one class of the constituency comes out with absolutely zero and another class – the creditors – gets a multiple of

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[12] Loral is a leading manufacturer of satellites and owner/operator of satellite networks.

[13] The Little Guy Loses Out In Loral's Bankruptcy Reorganization, *Barron's* Aug. 1, 2005: 25

their investment back." [13] What is wrong with the system, of course, is that current bankruptcy jurisprudence does not compensate equity holders for the taking of their stock.

The absence of Fifth Amendment protection for equity holders in bankruptcy proceedings reduces the market value of all companies with significant amounts of distressed debt, and consequently national wealth. Experienced investors know that regardless of the value of the business that equity will likely receive little or nothing in the event of a bankruptcy. This belief causes investors to reduce stock bids for all companies with distressed debt even though the vast majority never file for bankruptcy. In this way, the absence of Fifth Amendment protection for equity investors in bankruptcy reduces national wealth.

Providing equity investors just compensation for the taking of their stock in a bankruptcy reorganization then would increase national wealth. For example, the market value of Loral's common stock was about three dollars per share before the company unexpectedly filed to reorganize under Chapter 11.[14] This price would likely have been significantly higher if investors had assurances from this Court that equity would be justly compensated in the event of a bankruptcy. In Loral, the bankruptcy announcement, caused the stock price dropped to about $0.30 per share. The ninety per cent drop in the equity value, shows the market's anticipation that shareholders would get little or nothing in the bankruptcy reorganization.

The economically damaging outcome in Loral would not happen, however, if this Court, for example, provides

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[14] Loral had agreed to sell one of its satellite networks for about a billion dollars, however, the buyer required Loral to file for bankruptcy as a condition for the sale.

equity holders compensation equal to the market price of the stock immediately prior to the bankruptcy filing based on the presumption that this price reflects an efficient market. This compensation, of course, could be provided by stock or warrants in the reorganized venture.

Presuming the pre-announcement market price as just compensation, would also improve the bankruptcy process. Priority creditors would no longer have the incentive to undervalue the debtor which under current practice provides them the largest share of the reorganized firm. Under the new requirements, undervaluing the debtor would serve to increase the equity holders' share of the reorganized firm and reduce the share going to the priority creditor. Nor would the priority creditor have the incentive to overvalue the debtor. While overvaluation would reduce the equity holders' share, it would also increase the distributions to lower priority creditors.

Granting this petition offers this Court the opportunity to invigorate Fifth Amendment jurisprudence to protect equity investors and low priority creditors in Genesis and many other high debt companies from speculators in priority debt, who profit from lax Fifth Amendment protection by pushing fundamental solvent companies into bankruptcy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

February 27, 2007

Respectfully submitted,

James J. Hayes
Petitioner Pro Se
4024 Estabrook Dr.
Annandale, VA 22003

APPENDIX:

Third Circuit Opinion A1

District Court Opinion A5

Bankruptcy Court Ruling A11

Third Circuit Rehearing Denial A16

Wall Street Journal Article A18

DPS-333 **NOT PRECEDENTIAL**

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 05-4005

IN RE: GENESIS HEALTH VENTURES, INC., et al.;

Debtors

JAMES J. HAYES,
Appellant

On Appeal From the United States District Court
For the District of Delaware
(D.C. Civ. No. 04-cv-00477)
District Judge: Honorable Joseph J. Farnan, Jr.

Submitted On Appellee's Cross-Motion
To Dismiss The Appeal
September 8, 2006

Before: FUENTES, VAN ANTWERPEN AND
CHAGARES, CIRCUIT JUDGES

(Filed October 4, 2006)

OPINION

PER CURIAM

James J. Hayes, a former shareholder of Appellee/reorganized debtor Genesis Health Ventures, Inc. (with its affiliated co-debtors and Appellees, hereafter referred to collectively as "Genesis"), appeals from the order of the United States District Court for the District of Delaware

issued July 23, 2005, dismissing as equitably moot his appeal of the Bankruptcy Court's order denying his motion for appointment of a post-confirmation equity committee.

On September 13, 2001, after the Bankruptcy Court rejected Hayes's objections to the plan and denied his first request for an equity committee, the Bankruptcy Court entered judgment confirming the plan of reorganization in the jointly administered cases of *In re: Genesis Health Ventures. Inc. et al.*, Bankruptcy Case No. 00-2692, and In re: Multicare AMC, Inc., Bankruptcy Case No. 00-2494. *See In re Genesis Health Ventures, Inc.*, 266 B.R. 591 (Bankr. D. Del. 2001). Hayes filed two notices of appeal from the Bankruptcy Court's 2001 order, which were docketed separately. He also made a request for the appointment of an equity committee (his first request to the District Court, but the second such request overall), which the District Court denied. The District Court dismissed Hayes's appeal from the Bankruptcy Court's judgment as equitably moot. It dismissed the second, duplicative appeal as previously litigated. The District Court denied Hayes's motion to reopen the second duplicative appeal and this Court affirmed. *In re: Genesis Health Ventures. Inc., et al.*, C.A. No. 04-1862 (3d Cir. Dec. 6, 2004). The Supreme Court denied Hayes's petition for a writ of certiorari. *See Hayes v. Genesis*, 125 S.Ct. 2947 (2005).

Meanwhile, in 2004, Hayes went back to Bankruptcy Court seeking a ruling on a motion for appointment of a post-confirmation equity committee that he had filed in 2001, after the Bankruptcy Court entered judgment. The Bankruptcy Court denied the motion on May 13, 2004, holding that it was "grossly untimely," that the doctrine of equitable mootness applied to the Genesis Plan, and that no extraordinary circumstances existed warranting the appointment of a post-confirmation equity committee. Hayes appealed and on July

23,2005, the District Court dismissed the appeal under the doctrine of equitable mootness. Alternatively, the District Court affirmed the Bankruptcy Court's denial of the motion because Genesis was completely insolvent. Hayes filed a timely notice of appeal.

We have appellate jurisdiction pursuant to 28 U.S.C. 99 I 58(d) and 1291. Our review of the Bankruptcy Court's decision is de novo. In re Telegroup, 281 F.3d 133, 136 (3d Cir. 2002). We will treat the Appellee's motion to dismiss as a motion for summary affirmance and we will affirm for substantially the same reasons set forth by the District Court in its opinion.

Under the doctrine of equitable mootness, "[a]n appeal should ... be dismissed as moot, even though effective relief could conceivably be fashioned, where implementation of that relief would be inequitable." In re Continental Airlines, 91 F.3d 553,559 (3d Cir. 1996). The equitable mootness doctrine "prevents a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract." Nordhoff Investments Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 185 (3d Cir. 2001). In determining whether dismissal for equitable mootness is warranted, a court must consider five factors: (1) whether the reorganization plan has been substantially consummated; (2) whether a stay has been obtained; (3) whether the relief requested would affect the rights of the parties not before the court; (4) whether the relief requested would affect the success of the plan; and (5) the public policy of affording finality to bankruptcy judgments. "[T]he foremost consideration is whether the reorganization plan has been consummated." In re PWS Holding Corp., 228 F.3d 224, 236 (3d Cir. 2000). Moreover, it is incumbent on the appealing parties to obtain a stay where there is a "clear possibility" that their claims would

become moot. See Continental, 91 F.3d at 566. And, if the relief requested on appeal would jeopardize the success of the reorganization plan by causing its "reversal or unraveling," then dismissal of the appeal for equitable mootness is favored. See PWS Holding Corp., 228 F.3d at 236. Finally, the public policy favoring the finality of bankruptcy judgments, although identified as a separate factor, in truth, provides the lens through which the other factors should be viewed.

With the foregoing principles in mind, we conclude that the District Court correctly dismissed the appeal for equitable mootness. The Plan has been substantially consummated. Hayes did not seek or obtain a stay of the confirmation order. The rights of third parties who have long relied on the consummated plan would be negatively affected, and the relief that Hayes seeks would likely cause the reversal or unraveling of the Plan. If, as Hayes asserts, the plan is unfair and inequitable, it would be so for all Debtors' unsecured creditors and would require a newly negotiated plan. Finally, the consummation of the plan in 2001, the reliance upon it by third parties for all these years, and the negative impact of Hayes's request for relief on the success of the plan, all operate to the detriment of the long recognized public policy supporting the finality of bankruptcy judgments.

We have thoroughly reviewed Hayes arguments on appeal and find that they lack merit. Because no substantial question is presented by this appeal, the District Court's judgment will be affirmed, Appellee's cross-motion to dismiss the appeal, treated as a motion for summary affirmance, is granted.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

IN RE:	:	Chapter 11
GENESIS HEALTH VENTURES, INC., et al.,	:	Bankruptcy Case No. 00-2692-JHW
Debtors.	:	
JAMES J. HAYES,	:	Civil Action No. 04-0477-JJF
Appellant,	:	
v.	:	
GENESIS HEALTH VENTURES, et al., INC.,	:	
Appellees.	:	

James J. Hayes, Pro Se Appellant.

Mark D. Collins, Esquire, Russell C. Silberglied, Esquire and Christina M. Houston, Esquire of RICHARDS, LAYTON & FINGER, P.A., Wilmington, Delaware.
Of Counsel: Adam P. Strochak, Esquire and Lisa R. Fine, Esquire of WEIL, GOTSHAL & MANGES LLP, Washington, D.C. Michael F. Walsh, Esquire and Gary T. Holtzer, Esquire of WEIL, GOTSHAL & MANGES LLP, New York, New York. Attorneys for Appellees.

MEMORANDUM OPINION

July 23, 2005
Wilmington, Delaware

Farnan, District Judge.

Pending before the Court is an appeal of the May 13, 2004 Order of the United States Bankruptcy Court for the District of Delaware denying the motion of Appellant, James J. Hayes, for appointment of a post-confirmation equity committee. In addition, the Debtors, Genesis Health Ventures, Inc. and its affiliates ("Genesis") have filed a Motion For Damages And Costs For Frivolous Appeal Pursuant To Bankruptcy Rule 8020 (D.I. 15). For the reasons discussed, the Court will dismiss this appeal, and in the alternative, affirm the May 13, 2004 Order of the Bankruptcy Court. In addition, the Court will deny the Motion For Damages And Costs filed by Genesis,

I. Parties Contentions

By his appeal, Hayes contends that the Bankruptcy Court erred in declining to appoint a post-confirmation equity committee. Hayes contends that the Bankruptcy Court failed to consider whether the equity shareholders were adequately represented, whether the shares were widely held and publicly traded, the size and complexity of the bankruptcy proceeding, the timing of his request vis-a-vis the status of the case, and "new evidence" in the *Haskell* Complaint. Hayes also contends that the Bankruptcy Court's decision violates shareholders' due process rights under the Fifth Amendment.

In response, Genesis contends that Hayes' appeal should be dismissed under the doctrine of equitable mootness, because the Plan has been substantially consummated and Hayes did not obtain a stay of the confirmation order. Genesis also contends that Hayes' appeal is barred by the doctrine of res judicata and collateral estoppel. Specifically, Genesis refers the Court to two prior appeals filed by Hayes and dismissed by the Court. In addition, Genesis points out that the

Third Circuit has affirmed this Court's dismissal of Hayes' appeal of the confirmation order, and therefore, Hayes' request to appoint an equity committee to litigate the appeal of the confirmation order is moot.

In the alternative to its procedural arguments in support of dismissal, Genesis contends that Hayes' appeal should be dismissed on the merits, because Genesis is "hopelessly insolvent." As a result, Genesis contends that the costs associated with the appointment of an equity committee outweigh the concern for shareholder representation.

II. Standard of Review

The Court has jurisdiction to hear an appeal from the Bankruptcy Court pursuant to 28 U.S.C. § 158(a). In undertaking a review of the issues on appeal, the Court applies a clearly erroneous standard to the Bankruptcy Court's findings of fact and a plenary standard to its legal conclusions. See Am. Flint Glass Workers Union v. Anchor Resolution Corp., 197 F.3d 76, 80 (3d Cir. 1999). With mixed questions of law and fact, the Court must accept the Bankruptcy Court's finding of "historical or narrative facts unless clearly erroneous, but exercise[s] 'plenary review of the trial court's choice and interpretation of legal precepts and its application of those precepts to the historical facts." Mellon Bank. N.A. v. Metro Communications, Inc., 945 F.2d 635, 642 (3d Cir. 1991) (citing Universal Mineral. Inc. v. C.A. Hughes & Co., 669 F.2d 98, 101-02 (3d Cir. 1981)). The appellate responsibilities of the Court are further understood by the jurisdiction exercised by the Third Circuit, which focuses and reviews the Bankruptcy Court decision on a de novo basis in the first instance. In re Telegroup, 281 F. 3d 133, 136 (3d Cir. 2002) .

III. Discussion

A. Whether Hayes' Is Entitled To Relief On The Issues Raised In His Appeal Of The Bankruptcy Court's May 13, 2004 Order

Under the doctrine of equitable mootness, "[a]n appeal should... be dismissed as moot, even though effective relief could conceivably be fashioned, where implementation of that relief would be inequitable." In re Continental Airlines, 91 F.3d 553, 559 (3d Cir. 1996) (en banc). The equitable mootness doctrine is aimed at "prevent[ing] a court from unscrambling complex bankruptcy reorganizations when the appealing party should have acted before the plan became extremely difficult to retract." Nordhoff Investments, Inc. v. Zenith Elecs. Corp., 258 F.3d 180, 185 (3d Cir. 2001). As adopted by the Third Circuit in Continental, the doctrine of equitable mootness requires the court to balance five factors which are unique to bankruptcy proceedings:

(1) whether the reorganization plan has been substantially consummated; (2) whether a stay has been obtained; (3) whether the relief requested would affect the rights of parties not before the court; (4) whether the relief requested would affect the success of the plan; and (5) the public policy of affording finality to bankruptcy judgments.

Continental, 91 F.3d at 560. The manner in which these factors are weighed depends on the facts and circumstances of each case. Id.

In Grimes v. Genesis Health Ventures, Inc., 280 B.R. 339, the Court concluded that an appeal of the confirmation order in the Genesis bankruptcy cases was equitably moot based on the Continental factors. The Court's conclusions in *Grimes* regarding the application of the Continental factors applies

with equal force to this case. The Plan has been substantially consummated, and Appellant neither sought nor obtained a stay of the confirmation order. Because the confirmation order cannot be challenged, Appellant's request for the appointment of a post confirmation equity committee to support the appeal of the Bankruptcy Court's September 20, 2001 confirmation order is equitably moot.[1]

In addition, the Court notes that the United States Supreme Court has denied Appellant's application for certiorari review of the Third Circuit's decision affirming the Court's dismissal of his appeal of the confirmation order in Civil Action No. 01-718 JJF. Because there is no avenue of appeal left for Appellant to pursue with respect to the confirmation order, Appellant's challenge co the Bankruptcy Court's denial of a post-confirmation equity committee to guide the appeal of the confirmation order, i.e. the underlying basis for this appeal, is also actually moot.

In the alternative, the Court concludes that the Bankruptcy Court correctly denied Hayes' request for the appointment of a post-confirmation equity-committee. The Bankruptcy Court's finding that Genesis is completely insolvent is supported by the valuation evidence presented to the Bankruptcy Court, and the Court concurs with the Bankruptcy Court's conclusion that the appointment of an equity committee is not warranted in the circumstances of this case. Accordingly, the Court will, in the alternative, affirm the May 13, 2004 Order of the Bankruptcy Court.

B. Whether Genesis Is Entitled To Damages And Costs In Connection with Litigating This Appeal

1 Appllant refers to "new evidence" in the form of the Haskell Complaint. However, the Haskell Complaint has been dismissed by the bankruptcy Court in its entirety, and therefore, the Court is not persuaded that the allegations of the Haskell Complaint have relevance for this appeal.

As for Genesis' Motion For Damages And Costs, the Court will deny Genesis' Motion. Although Hayes presented this issue to the Bankruptcy Court three times, and presented it to the Court by motion in 01-718, Hayes did not specifically appeal an Order of the Bankruptcy Court addressing this issue until the instant appeal. Hayes' appeal was also not rendered actually moot until June 20, 2005, when the Supreme Court denied his application for certiorari review of the Third Circuit's decision affirming the Court's Order in Civil Action Ol-0718-JJF. In these circumstances and given Hayes' status as a pro se litigant, the Court declines, at this juncture, to award damages and costs. Accordingly, the Court will deny Genesis' Motion For Damages And Costs.

IV. Conclusion

For the reasons discussed, the Court will dismiss this appeal, and in the alternative, affirm the May 13, 2004 Order of the Bankruptcy Court. In addition, the Motion For Damages And Costs filed by Genesis will be denied.

An appropriate Order will be entered.

UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEW JERSEY

IN THE MATTER OF	:	00-2692
	:	
GENESIS HEALTH VENTURES, INC., ET AL.,	:	Camden, New Jersey
	:	May 13, 2004
Debtor.		

TRANSCRIPT OF HEARING
BEFORE THE HONORABLE JUDITH H. WIZMUR
UNITED STATES BANKRUPTCY JUDGE

APPEARANCES:

For the Debtors:	RUSSELL C. SILBERGLIED , ESQUIRE Richards, Layton & Finger One Rodney Square Wilmington, Delaware 19899
For Shareholders:	JAMES J. HAYES 4024 Estabrook Drive Annandale, Virginia 22003
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Proceedings recorded by electronic sound recording; transcript produced by transcription service.

In March -- March 13th, 2004, Mr. Hayes, the movant corresponded with me to inquire about and to reflect that the motion was pending and should be acted upon. He alluded to a complaint that had been filed, I believe, in the Southern District of New York -- I'm not sure -- the Eastern District?

MR. SILBERGLIED: It was originally filed in the State Court in New York and removed to the Southern District of New York.

THE COURT: Okay. A suit by subordinated bond holders in the Genesis matter pre-confirmation against senior bond holders — senior lenders rather — in the case contending that the senior lenders had exercised fraud in the process of confirmation in the process of the valuation of the debtors and that there ought to be damages paid by the senior lenders to the plaintiffs in connection with that alleged fraudulent activity.

Mr. Hayes relies in part on the allegations in that complaint to support the proposition that a Creditors Comm -- that an equity security committee should be appointed to assist the former equity security holders to assert their positions on appeal to the Court of Appeals at this point.

And, I will deny that request. I think that procedural and substantive bases exist for that denial. I agree with counsel for the debtors' arguments in that regard.

Procedurally, this request is grossly untimely. We had -- I ruled on this matter when I rejected the quest for equity security holder status at the time of confirmation. I ruled on it in my September 12, 2001 opinion. In fact, one of -- a basis for -- a ground for denying the request was that it was untimely

then back two and a half years ago, almost three.

Indeed, one of the arguments advanced by various objectors, including perhaps Mr. Hayes at the time, was that the reorganization process had been -- had gone forward too quickly, that there was some untoward -- there was a suggestion that the speed at which the process had gone forward suggests some untoward activity by the proponents of the plan and those who supported the plan.

And, I rejected that in a discussion of the good faith of the plan and its proponents, noting that the case had been pending for a year at that point and that the desire to proceed expeditiously, barring some extraordinary presentationt could not defeat a good faith presentation. And, there was no basis, other than a -- an allegation of bad faith to support the concern about the speed with which the plan was proposed.

So, we had a year, as counsel for the debtor recalls, for equity to come forward to seek representationt to seek to assert its position. Indeed, equity could always participate in the case, could always obtain a representation on their own. If there was a basis for the designation of a committee, that could have been applied for sooner than the eleventh hour basically. Indeed, it was applied for in July initially through the United States Trustee after the plan and disclosure statement were submitted.

Indeed, perhaps equity will suggest -- equity represented by Mr. Hayes here -- that it wasn't until then that it became apparent that the intention of the debtors or the senior lenders or a combination of them to, in effect, extinguish equity -- it was not apparent to equity until then that that would be the intent of the proponents of the plan. And, that may be. But,

the opportunity to take an active role through representation through a prospective committee had to have been presented earlier in order to have any prospect of achieving that result.

Indeed, in many cases, there may be a basis beyond threshold demonstration of insolvency to warrant the appointment of a committee. There are cases cited in the submissions in which there is serious contest about valuation. And, indeed, in this case, we had at confirmation contest about valuation, and that contest was -- in the words that I used -- vigorously scrutinized and resolved in the opinion.

The balance was then, when I denied the motion in the September 12th opinion, substantially in favor of rejecting the insolvency question, as I determined it to be resolved in the equity security holders request, not only because the opinion, so favored the basic contemplation that there was no equity to reach shareholders, even in the most favorable interpretation of the various expert opinions that were received.

The fact there was, for the most part, a consensual plan of the most substantial interests represented in the case, compelled, in my mind, the drawing of the balance against the constitution of a -- an equity security committee at that point in the case and in that context.

And, things have only progressed to reduce the opportunity of an equity security committee to be appointed rather than enhanced, the passage of time alone certainly, the fact that there was no stay pending appeal of the confirmation order. And, therefore, the process of consummation of the plan went forward, distribution to the effect of -- as counsel reflects -- 99 percent of what was to be distributed.

Mr. Hayes suggests that he is not seeking to disrupt that distribution, but simply to reallocate the senior lenders' receipts to others -- I'm not -- to whom -- I'm not sure, to equity, presumably. He doesn't insert in that analysis the interests of the other parties -- that is, the unsecured creditors, the subordinated bond holders — who would precede any taking by equity in any event.

And, how you could take away what you have already given in this context I'm not sure. I have grave doubts that such a procedure could be accomplished in a way that would not require the unscrambling of the egg, if you will. Indeed, the concept of equitable mootness can be applied by the Bankruptcy Court and has substantial application in this context.

I also agree wholeheartedly with counsel's concerns about post-confirmation appointment of committees. I think that such a process may not be countenance within the framework of the Bankruptcy Code. And, even if it is, it would be available only in the most extraordinary of situations. And, I cannot fit this set of facts into that kind of equation.

So, I will determine to deny the motion of the — of Mr. Hayes to appoint an equity security committee at this stage and in this posture.

DPS-333

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 05-4005

IN RE: GENESIS HEALTH VENTURES, INC.

Debtors
JAMES J. HAYES,
Appellant

On Appeal from the United States District Court for the District of Delaware (D.C. Civil No. 04-cv-00477) District Judge: Honorable Joseph J. Farnan, Jr.

Present: SCIRICA, Chief Judge, McKEE, RENDELL, AMBRO, FUENTES, SMITH, FISHER CHAGARES and *VAN ANTWERPEN, Circuit Judges

SUR PETITION FOR REHEARING
WITH SUGGESTION FOR REHEARING EN BANC

The petition for rehearing filed by *pro se* Appellant having been submitted to all judges who participated in the decision of this court, and to all the other available circuit judges in active service, and a majority of the judges who concurred in the decision not having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court en bane, the petition for rehearing is hereby denied.

*Honorable Franklin S. Van Antwerpen assumed senior status on October 23, 2006; vote limited to panel rehearing only.

By the Court,
/s/ Franklin S. Van Antwerpen
Circuit Judge

Dated: November 29, 2006
par/cc: Mr. J.J.H.
J.M.M., Esq.
R.C.S., Esq.
A.P .S., Esq.

Hedge Fund's Gamble Manages to Beat Buffett
Manager's Complex Plan Provides a Healthy Return
From Distressed Company (March 29, 2006; Page C3)

By Karen Richardson

Plenty of people pattern their investment strategy after the value-oriented philosophy of Warren Buffett, who has likened his approach to buying dollar bills for 40 cents. But when Mr. Buffett offered that same lowly figure — 40 cents -- for each share of Seitel Inc. a few years ago, William "Mickey" Harley III convinced shareholders of the troubled seismic-data company to reject the Omaha billionaire's bid.

Even though the stock of the Houston-based company, then under bankruptcy-court protection, was trading around 35 cents at the time, Mr. Harley, a hedge-fund manager, felt Seitel shareholders could do better. Seitel makes software that allows the user to track tremors and other data for the oil business and other industries. Its plunge into Chapter 11 was precipitated by a scandal in which a former chief executive misused company funds.

Mr. Buffett still did OK on Seitel: Berkshire Hathaway Inc. had bought all of the company's bonds just before it filed for protection from creditors in July 2003, and Mr. Buffett's investment company earned a return of 52% on that bet when Seitel emerged from bankruptcy protection just over a year later. But Mr. Harley, whose Mellon HBV U.S. Event-Driven Fund LP recently cashed out on its Seitel trade, did even better by hanging onto the shares. The fund, based in New York, made more than seven times its initial outlay.

"It's exciting whenever you can earn a great return for your investors," says Mr. Harley, who takes some good-natured delight in having outperformed Mr. Buffett — at least once. The 42-year-old former soap-factory foreman

acknowledges that his Seitel play "was very complex, but what we brought to the table was our ability to structure a deal."

It's rare for shareholders to come out ahead in Chapter 11 proceedings. Almost always, there is little or nothing left for investors holding equity after a company has paid bondholders, bankers and other creditors who have first dibs on the company's remaining money.

But Mr. Harley, whose fund initially owned 9.9% of Seitel, proposed another plan to shareholders, management and a bankruptcy court: Sell new debt to a hearty bunch of risk-taking investors to payoff existing debt holders — in this case, Berkshire Hathaway. Simultaneously, Mr. Harley proposed to raise another $75 million in a so-called rights issue of new stock, guaranteeing that his fund would buy any of that stock that wasn't taken up by existing shareholders. For that promise to "backstop" the right issue, HBV was granted 15 million warrants giving the fund the right to buy Seitel shares at a future date at a price of 72 cents each.

Shareholders voted for HBV's plan, and Berkshire, which paid $189 million for all of Seitel's bonds, cashed out with $288 million.

By that point, HBV owned about 24% of Seitel's stock, including the warrants, having paid an average price of 40 cents a share. In late February, HBV sold that entire stake to another hedge fund, ValueAct Capital, for $2.75 a share—nearly seven times its average purchase price. Yesterday, shares of Seitel closed at $3.18 in over-the-counter, Bulletin Board trading.

Mr. Harley's gamble on a distressed company gave a big boost to his fund, whose past performance has been a

bit choppy: Last year, the fund returned 1-48% after gaining 23.36% in 2004 and 6.27% in 2003, according to hedge-fund performance tracker Greenwich-Van Advisors LLC, for an average annual return of about 13% over that period. Mr. Harley chalks his ups and downs to the fund's "event -driven" strategy.

While Mr. Harley might have bested Mr. Buffett on the Seitel deal, the investment bard's track record is better—and much longer. Mr. Buffett says he has clocked an average annual return of 31% on his investments since 1951, which is back even before he took over Berkshire Hathaway.